



Military Justice Act of 2016

Smart Pack Instructor Guide

The Smart Pack is a packet of MJA16 materials specific to both the Staff Judge Advocate and the Convening Authority, and is intended to provide initial training on the changes to the military criminal justice system, as required by statute. Included in the Smart Pack is a PowerPoint presentation with instructor notes, an accompanying Instructor Guide, several quick reference guides, the updated Quickman, and the change pages only of the Quickman, in case printing the entire Quickman is unnecessary. Both the PowerPoint presentation and the Instructor Guide are designed to be tailored to the type of Convening Authority needing training, and, in some cases, the PowerPoint presentation may not even be needed for training. All of the materials are simply tools to assist with providing initial and periodic training on the changes to the military justice system ushered in by MJA16.

The PowerPoint presentation, if fully taught, runs approximately 2 hours even with time left for question & answers and/or discussion. Depending on whether the Convening Authority is a General Court Martial Convening Authority or Special Court Martial Convening Authority, more slides and information can be skipped. Similarly, if the Convening Authority is familiar with or has convened courts-martial previously, more slides and information can be condensed or skipped. The Instructor Guide below indicates, in line, which materials should or should not be skipped.

The information in this guide includes both slide text as well as additional information for instructors only. The guide follows the “MJA16 Smart Pack” PowerPoint presentation slide-by-slide. The unbolded regular font is the slide text in regular font and is listed first under each slide number. **The instructor material is listed in bold below the slide text.**

If you have suggestions for corrections or other improvements to this training, we want to hear from you. You can either:

- Write your comments on a copy of the instructor notes or slides or on the Instructor Guide, and mail it to us (360 Elliot St., Newport, RI 02841) OR send it via e-mail (jaspreet.saini@navy.mil); or
- Send us an e-mail with your comments (jaspreet.saini@navy.mil)

Slide 1: Title Slide

- A. [Title Slide]

Slide 2: Roadmap

- A. Roadmap
 - 1. MJA16 Background
 - 2. Implementation Timeline
 - 3. Major Changes
- B. **The training covers 3 issues: 1) the purpose and background for MJA16; 2) current progress and implementation of the statute; 3) the substantive training for Convening Authorities.**

Slide 3: MJA16 Background

- A. Quote from Sen. John McCain on MJA16
“The NDAA implements the recommendations of the Department of Defense Military Justice Review Group by incorporating the Military Justice Act of 2016 as amended by the committee. *Taken together, the provisions contained in the conference report constitute the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago* [emphasis added].”
- B. **Prior to this Act, Congress updated the military criminal justice system in a piecemeal fashion, and no holistic review had occurred since 1984. In 2013, General Martin Dempsey recommended to Secretary of Defense Robert Hale that the Military Justice Review Group (MJRG) conduct a complete, top-to-bottom review of the entire UCMJ and Manual for Courts-Martial (MCM). Then-CAAF Chief Judge Andrew Effron lead the MJRG and senior judge advocates from all of the Services served as team leads in conducting an extensive review of the UCMJ and MCM. Upon completion, the MJRG published two reports, one of which is a 1300-page report detailing recommended changes to military justice along with considerable analysis of the military criminal justice system and the federal criminal justice system. The recommendations were then submitted to Congress in December 2015, of which many were subsequently adopted by Congress when it enacted MJA16. The answers to many “why” questions are found in the MJRG report, and the most commonly received ones are included in the guide for the instructors. A copy of 1300-page report can be found at http://ogc.osd.mil/images/report_part1.pdf.**

Slide 4: MJA 16 Background [cont.]

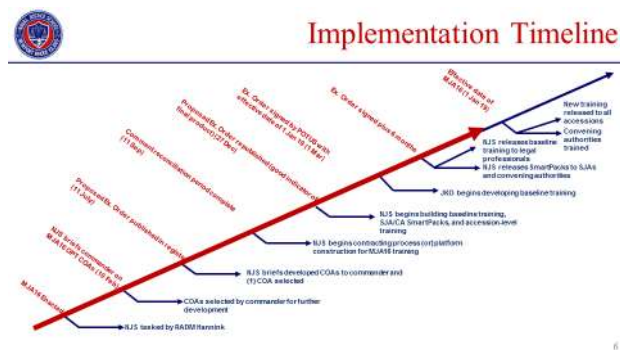
- A. “TRAINING FOR CERTAIN OFFICERS.—Under regulations prescribed by the Secretary concerned, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter.”
- References: National Defense Authorization Act for Fiscal Year 2017, Division E, Military Justice Reform, Section 5503 (amending UCMJ Article 137, adding new subsection (c)) and NAVADMIN 281/18
- B. **MJA16 requires periodic training on the military criminal justice system for all officers who convene courts-martial or have authority to impose NJP. Service regulations on what constitutes periodic training are still being written at the time this training and instructor guide were drafted. This training is meant to serve as the initial periodic training required by the statute, as noted in NAVADMIN 281/18**

Slide 5: Implementation – Key Dates

[SKIP THIS SLIDE IN MOST BRIEFS TO CONVENING AUTHORITIES; KEY TAKE-AWAY IS EFFECTIVE DATE FOR MJA16 – 1 JAN 19]

- A. Key Dates
- National Defense Authorization Act for FY17: 23 Dec 16
 - Draft Executive Order Published to Fed. Register: 11 July 17
 - Executive Order Signed: 1 Mar 18
 - Effective Date: NLT 1 Jan 19
- B. **Dates provide context as to order and legislative process for implementing changes to military justice system. The deadline for implementation is no later than 1 January 2019.**

[SKIP THIS SLIDE; INTENDED FOR JUDGE ADVOCATE REVIEW ONLY]



Slide 7: Major Changes

A. Cradle-to-Grave: Offense through Appeal

- Jurisdiction
- Pre-Trial Procedure
- Trial Procedure
- Sentencing
- Post-Trial Procedure and Review
- Punitive Articles
- UCMJ Training
- Review Panel and Annual Reports

B. MJA16 has made sweeping changes to the military criminal justice system leaving no part untouched. All parts of our system have been touched in some respect, however, not all changes are significant. Of note, approximately 40% of the changes contained in the Act concern punitive articles, most of which are not major changes. Only a handful of changes to the punitive articles are substantive.

Slide 8: Major Changes: Roadmap

A. Roadmap

1. Jurisdiction
2. Punitive Articles
3. Preferral and Referral Process
4. Alternative Disposition
5. Trial Process
6. Post-Trial Process

- B. To best explain the changes, the PowerPoint will cover 6 different modules. The 6 modules track the flow of a case, from inception at the point of misconduct to the court-martial and post-trial review process.

Slide 9: 1: Jurisdiction

- A. [Module 1 Intro Slide/Photo]
- B. MJA16 contains several significant changes to both personal and subject matter jurisdiction and procedural jurisdiction of the UCMJ. The changes include a new type of Special Court-Martial, the composition of member panels, expanded personal jurisdiction over reserve personnel.

Slide 10: 1: Jurisdiction – New Special Court-Martial

- A. New SPCM Option
- Convene without consent*
 - Limited Forum
 - Military Judge alone
 - Offenses*
 - Punishment
 - NMT 6 months confinement
 - NMT 6 months forfeitures
 - No punitive discharge
- B. A new type of special court-martial has been established by UCMJ Article 16 (c)(2)(A). It will be referred to as “no BCD SPCM” in this guide. The purpose of this SPCM is to provide another court-martial option for common offenses that are serious enough to warrant a SPCM, but are still relatively minor (examples are provided below).
- C. The “no BCD SPCM” can be convened even over the accused’s objection, subject to a few limitations.
- Establishment Procedures. Should the CA wish to use this new SPCM, he or she must do so by “special instruction” on the charge sheet (referral/block 5).
 - Limitations and Objections
 - The accused can only object under two jurisdictional circumstances, which must be done prior to arraignment:
 1. If the offense, tried at a GCM, carries a maximum confinement in excess of two years EXCEPT for wrongful

use or possession of a substance defined under Article 112a(b)

- Note: The two years is related to a single offense that carries more than 2 years; 5 separate charges that had a maximum of 6 months each would not qualify
- 2. If the offense, upon conviction, requires sex offender registration under DoD Instruction 1325.07
- If the military judge sustains an objection to the “no BCD SPCM,” the case is returned to the CA for a new referral decision (regular SPCM or GCM or other alternative disposition). The remedy is not to dismiss with prejudice.

D. The new SPCM is a court-martial of limited forum.

- Because, as noted above, only minor offenses can be referred to this court-martial, all such courts-martial are military judge alone. There is no option to be tried or sentenced by service members.
- Only minor offenses can be brought before this new court-martial. As noted above, the limitations on the offenses significantly narrows the scope and types of offenses though the exception to the rule (permitting wrongful use or possession of Article 112a(b) substances) is notable. The other types of qualifying offenses include malingering (some); most UA offenses; some missing movement offenses; resisting arrest/escaping custody and PTC; breaking restriction; disrespect offenses (few orders violations); wearing unauthorized insignia/awards; parole violation; some loss/damage to military property and non-military property; drunk on duty; larceny of less than \$1k; DUI offenses; some assault offenses (BUT never if aggravated). There has been some discussion that the exception to the offense limitation was specific to the Marine Corps to permit an allegedly easier/faster court-martial for single specification drug offenses. However, as noted in the slide, a punitive discharge is off the table and an administrative board would still be required to discharge the accused.
- In addition to offense limitations, there are also punishment limitations that are different from the traditional jurisdictional maximums of a normal SPCM. Confinement is limited to no more than 6 months. Forfeitures are limited to 2/3 pay for no more than 6 months. And, punitive discharges are not authorized.
 - If a discharge is desired, the CA would have to pursue to an administrative separation (ADSEP) after the court-martial or refer the charges to a traditional GCM or SPCM where a punitive discharge is a possible punishment.

E. Must wait until 1 January 2019 to utilize this new SPCM. Can directly refer a case to this new forum if all of the charged offenses occurred in 2019. May be

able to refer a case to this new forum IF there is at least one offense that is alleged to have occurred in 2019. If that is the case, the accused must agree to be tried in this forum (per R.C.M. 902A). If NO offense on the charge sheet is alleged to have occurred in 2019, then this forum is not an available option.

Slide 11: 1: Jurisdiction – Summary Court-Martial

- A. Summary Court-Martial is NOT a criminal forum
 - Conviction at SCM is not considered a “criminal conviction”
 - Conviction → Finding of Guilty
- B. The UCMJ explicitly states that summary courts-martial are not criminal fora and, consequently, if found guilty, the result should no longer be termed a criminal conviction but a “finding of guilty.” The most significant take-away from this change is the change in collateral consequences if found guilty at SCM because it will no longer be a federal criminal conviction regardless if counsel is present.

Slide 12: 1: Jurisdiction – Member Panels

- A. Fixed Member Panels
 - 12 for Capital GCMs
 - 8* for GCMs
 - 4 for SPCMs
- B. Convening Orders
 - Detail Enlisted Members
 - Detail Alternate Members
- C. The number of members for courts-martial will change to have a fixed number of members for every panel. For SPCMs, there must be 4 members. For non-capital GCMs, there must be 8 members. If, after impanelment, a non-capital GCM may have as few as 6 members without risking quorum. Capital GCMs must have 12 members.
- D. CAs will be able to detail enlisted members on the convening order directly without waiting for the accused to request enlisted representation on the panel. Additionally, the restriction on having enlisted members from the same unit as the accused has been eliminated. The idea here is that trial and defense counsel can use the traditional voir dire process to strike potential members who they feel may have bias for/against the accused regardless of assignment. If detailing enlisted members on convening order, ensure that a sufficient number are included should an enlisted

accused elect 1/3 enlisted representation and the detailed number would survive voir dire and challenges (2 enlisted members are required for SPCM and 3 for GCM)

- E. CAs will now be able to detail alternate members (both officer and enlisted) on the convening order. CAs may specify a set number of alternates or simply allow the military judge to detail alternates (no more than 3) from the larger member pool listed on the convening order. The purpose of allowing alternate members is not only to mirror federal practice, but to save significant time during a court-martial if a new member had to be detailed mid-trial (and re-hear all of the testimony and evidence presented).

Slide 13: 1: Jurisdiction – Reservists

- A. Expands jurisdiction over drilling reservists to include additional periods beyond the actual drill time to account for travel and consecutive drill time
- B. Reservists will now be subject to the UCMJ when:
 - a. traveling to or from training site;
 - b. during intervals between consecutive drills on the same day; and
 - c. during intervals between consecutive drill days

Example: ENS Smith (a reservist) has drill training from 0800 to 1600 on both Saturday and Sunday. Under the old rules, ENS Smith would not be subject to the UCMJ after 1600 on Saturday until 0800 on Sunday morning. Under MJA16, ENS Smith is subject to the UCMJ for the entire drill period over the two days from 0800 on Saturday morning to 1600 on Sunday afternoon. At this time, there is no additional guidance on whether the expanded jurisdiction will cover flexible drill periods when a reservist completes training during a work day and not during a single allocated drill weekend day

Slide 14: 1: Jurisdiction – Effective Dates

- A. Buckets Approach
 - 1. Offenses
 - 2. *Substantive Provisions*
 - 3. *Sentencing Provisions*
 - 4. Convening Authority's Action
 - 5. *Procedural Provisions*
- B. The changes to military justice system are effective at different dates to provide the most leniency to the accused (effective dates are different from the implementation date of 1 January 2019). To help clarify when the changes will go into effect, the

Services have adopted a “buckets approach” to categorize the different dates the changes will become effective. There are 5 buckets: Offenses, Substantive Provisions, Sentencing Provisions, Convening Authority’s Action, and Procedural Provisions. Each of these buckets have independent effective dates and supporting rationale. The changes discussed in Module 1 fall under 3 different buckets: substantive provisions, sentencing provisions, and procedural provisions.

- C. **First, Substantive Provisions.** Executive Order 13825 section 6(a) (the implementing regulations to MJA16) specifically enumerates which provisions of MJA16 are considered “substantive provisions.” Of the articles listed, the only one affected by Module 1 is Article 2 – Jurisdiction and only affects personal jurisdiction over reserve personnel. So, if you want to take advantage of the expanded personal jurisdiction over reservists as we discussed in this Module, all of the charged conduct must occur 1 January 2019 or later. If you have offenses that straddle 1 January 2019 in a Reserve case, then you cannot use the expanded personal jurisdiction unless you split up the charges into two separate courts-martial.
- D. **Second, Sentencing Provisions.** Executive Order 13825 section 10 also specifically enumerates which provisions of MJA16 are considered “sentencing provisions.” In this Module, the one topic we covered that falls into this bucket is the new special court-martial. As discussed earlier, this option is only available if all of the charged conduct occurs post-1 January UNLESS the accused opts into or agrees to this new court-martial. The accused can only opt into utilizing this new special court-martial if there is at least one offense that occurred in 2019. If all of the misconduct occurred prior to 2019, then the new special court-martial is not an available option.
- E. **Third, Procedural Provisions.** This bucket covers all of the other parts of MJA16 and the EO that are not implicated by any of the other 4 buckets. In this Module, this would implicate the new fixed number of members for general and special courts-martial AND the change in language regarding finding of guilty at summary court-martial (and its parallel change in language in M.R.E. 609). Because these two topics fall within the “procedural provisions” bucket, they are effective 1 January 2019, so long as the case has not been previously referred to a court-martial. For example, if a case was referred on 1 December but did not go to trial until 1 January, the number of members impaneled at trial on 1 January would follow the current system in place. If the case was referred on 1 January, then the new rules governing fixed number of members for general and special courts-martial would apply.

Slide 15: 2: Punitive Articles

- A. [Module 2 Intro Slide/Photo]
- B. **Understanding that you have jurisdiction of the alleged offender, the question then becomes what offenses are potentially on the table. The second major area that MJA16 has made substantial changes to are the punitive articles. Included in this module are changes to punitive article numbering, the migration of most Article 134 offenses to a specifically enumerated punitive article, and the creation of four new UCMJ offenses (and an additional one already in effect).**

Slide 16: 2: Punitive Articles – New Numbering

- A. **Changes**
 - Re-numbered offenses
 - Organized by similar conduct into 16 categories
 - Migrated most Article 134 offenses
- B. **The punitive articles have been re-organized and re-numbered into 16 categories. The Smart Pack materials includes 2 handouts useful for a judge advocate and CA, which lists all of the punitive articles in the new order (“Comparison of UCMJ Punitive Articles Pre and Post MJA 2016” and “Migrated 134 Offenses”). NOTE: While not covered in the PowerPoint presentation, amended offenses are briefly described below should the trainer receive questions about particular offenses. The one amended offense of note to CAs is the change to Article 120 definition of sexual contact (see below). Otherwise, proceed to Slide 17: 2: Punitive Articles – New Offenses.**
- C. **Amended Offenses**
 - **Article 110 – Improper hazarding of vessel now includes aircraft; this includes drones per the definition provided by 18 U.S.C. § 31**
 - **Article 111 (will be Article 113) – Driving under the influence requires a lower BAC level of 0.08/100 ml of blood (down from 0.10)**
 - **Article 120(g) – Sexual contact has a narrowed definition. To qualify as sexual contact, the accused must make contact with the alleged victim’s vulva, penis, scrotum, anus, groin, breast, inner thigh or buttocks. If one of the above listed body parts is not alleged to have been touched, then no sexual contact offense. Thus, the creepy shoulder rub or arm touching is no longer an offense under this article, though it might still be an offense (assault and sexual harassment) just not a sexual contact offense.**
 - **Article 134 Extramarital Sexual Conduct (formerly adultery) – The prohibited sexual acts have been expanded, to include genital to genital, oral**

to genital, anal to genital, and oral to anal intercourse. Court-ordered separation is an affirmative defense to this charge.

- **Article 134 – Text changed to provide worldwide jurisdiction over all non-capital federal crimes (clause 3 offenses). This was done to bring Article 134 in line with the Military Extraterritorial Jurisdiction Act and congressional intent.**

Slide 17: 2: Punitive Articles – New Offenses

A. New offenses

1. Article 93a
 - Addresses prohibited sexual activities with military recruit or trainee and person in position of special trust, such as recruiter or instructor
2. Article 117a
 - Addresses the wrongful broadcast or distribution of intimate visual images
3. Article 121a
 - Addresses fraudulent use of credit cards, debit cards, and other access devices
4. Article 123
 - Addresses misuse of government computers and government protected information
5. Article 132
 - Prohibits retaliating against those who plan to/do report an offense OR discouraging others from reporting an offense or privileged communication
6. Article 128b
 - Prohibits domestic violence by criminalizing a violent offense, threats, intimidation, or assault via strangulation or suffocation against a spouse, intimate partner, or immediate family member

B. MJA16 has created 4 new offenses; NDAA FY18 has also created a new offense, which is already in effect. A sixth offense was added when the NDAA for FY19 was signed by the President on 13 August. It goes into effect on 1 January 2019 with the rest of MJA16. This offense is Article 128b – Domestic Violence, and the statutory text can be found in Section 532 of the NDAA. NOTE: A brief overview of what each of the new offenses criminalizes is all that is necessary. The below detail is additional background information for the trainer and to provide context should a question arise during the training.

- a. **Article 93a: Prohibited activities with military recruit or trainee by person in a position of special trust**
 - **“Person in a position of special trust” is defined as a recruiter (primary duty is a recruiter) or trainer/instructor. Such persons may not engage in prohibited sexual activity with recruits or trainees.**

- “Prohibited sexual activity” is undefined by statute and will be governed by Service regulation. Current regulations do not define this term as written and prohibited relationships, as currently defined by the DODI, is too broad. OJAG Code 20 is tracking a list of service specific regulations that will need updating to reflect MJA16 changes.
 - Convictions will require proof that the accused had actual knowledge that s/he knew the status of the alleged victim; should have known will not suffice.
 - Consent is NOT a valid defense to this charge.
- b. **Article 117a: Wrongful broadcast or distribution of intimate visual images (NDAA FY18 - already effective as of 12 December 2017)**
- This offense was created as a response to the “Marines United” scandal. While it is already effective, only a few cases are currently being prosecuted under this article.
 - As the statute is broad and contains many undefined or new terms, proof issues and the scope of prohibited activity will be borne out of future litigation
- c. **Article 121a: Fraudulent use of credit cards, debit cards, and other access devices**
- This offense punishes the unauthorized use of credit cards and access devices as well as exceeding authorization to use them
 - “Other access devices” incorporates the federal definition, which includes account numbers, personal identification information, or “other means of account access.” For example, a person’s Amazon Prime account would fall under the definition of “access device.”
 - While this misconduct could be charged as a larceny, this offense drops the requirement that the victim be identified in the specification
- d. **Article 123: Offenses concerning Government computers**
- This article covers 3 separate offenses concerning computers:
 - Unauthorized distribution of classified information obtained from government computers;
 - Unauthorized access of a government computer to obtain classified or other protected information, such as PII;
 - Deliberately causing “damage” to a government computer, such as by transmitting computer viruses or other malware.
 - Due to the nature of these offenses, this is a niche article and prosecutions will likely only be seen in high-visibility cases.
- e. **Article 132: Retaliation**
- This article makes it an offense to either 1) retaliate against a service member for either reporting or planning to report criminal offenses as well as making privileged communications; OR 2) to discourage

anyone from reporting a criminal offense or making privileged communications.

- The critical element is that some “personnel action” must be taken in relation to the threat. “Personnel action” can be either negative actions against a person (threatening to give someone a false poor performance evaluation) or withholding positive actions (not recommending them for promotion the person otherwise would have made).

f. Article 128b: Domestic Violence

- This article criminalizes certain misconduct committed against a spouse, intimate partner, or immediate family member and is considered an act of domestic violence
- The misconduct must fall into one of five categories. At this time, definitions of the terms included are not available, but should become available soon. Please be on the alert for a Code 20 Sidebar for an updated Executive Order pertaining to this article
- The accused must (1) commit a violence offense the category of victims identified above, (2) commit another offense under the UCMJ against a person or property with the intent to threaten or intimidate such person; (3) violate a protective order with the intent to threaten or intimidate such person; (4) violate a protective order with the intent to commit a violent offense against such person; or (5) strangle or suffocate such person
- The statutory text can be found in Section 532 of the FY19 NDAA

Slide 18: 2: Punitive Articles – Effective Dates

A. Buckets Approach

1. *Offenses*
2. Substantive Provisions
3. Sentencing Provisions
4. Convening Authority’s Action
5. Procedural Provisions

B. The changes discussed in Module 2 all fall under 1 bucket: Offenses.

C. The key is to use the article that was in effect at the time the alleged offense was committed. For example, the accused is charged with a DUI committed on 31 December 2018, and the charge sheet would reflect the current article number (violation of Article 111) and elements for a DUI, NOT the MJA16 changed offense.

Slide 19: 3: Preferral & Referral Process

- A. [Module 3 Intro Slide/Photo]
- B. **When there is an incident, the CA continues to have multiple options that they can take after conducting a PIO (if necessary) or receiving the results of an NCIS investigation. The next module contains suggestive guidance for CAs (as well as SJAs) to consider in evaluating what the next step in a case should be.**

Slide 20: 3: Preferral & Referral Process: Non-Binding Disposition Guidance

- A. Manual for Courts-Martial, Appendix 2.1
 - 14 Factors for Consideration
 - 5 Inappropriate Factors
 - 4 Major Decision Points
 1. Initiation/Declination of UCMJ Action
 2. Charging Decisions
 3. Selecting Forum and Disposition
 4. Considering Guilty Plea Agreements
- B. **Congress enacted a new Article 33 requiring the establishment of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and trial counsel should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. The Disposition Guidance draws upon 3 sources:**
 - **The Principles of Federal Prosecution in the U.S. Attorneys' Manual;**
 - **The ABA's Criminal Justice Standards for the Prosecution Function; and**
 - **The National District Attorney's Association's National Prosecution Standards**
- C. **While the guidance is not binding, it is certainly helpful in framing your options and serves almost as a checklist for the types of considerations that should be accounted for at each stage of a case. The guidance is intended to mirror other similar prosecution standards and provides a more robust set of structured decision-making principles and charging standards beyond what is reflected in Rule for Courts-Martial 306. None of the factors listed in the guidance are new considerations, and should all already be considered by convening authorities, SJAs and trial counsel. Appendix 2.1 is still awaiting final approval, and will be available via Code 20 and the Smart Pack as soon as it is published.**

- D. **NOTE:** For those CAs who are familiar and comfortable with the decision-making process for sending cases to courts-martial (or declining to do so), should SKIP Slides 21 and 22. As noted above, the factors for consideration are not new and will be familiar to SJAs and CAs who have convened courts-martial previously.
- E. When a case or incident first comes across your desk, you have to determine what, if anything, should be done about the particular incident or potential misconduct at issue. Only if determining to pursue action, will one begin to think through what charges to specify and the type of forum and/or disposition (criminal or disciplinary). The four decision points are ways to think about when to refer to the Guidance and what considerations might be in play in a given case. The decisions are broken down to simply provide an easier to understand framework for the discussion you will have with your convening authority.
- F. In Module 3, there are three decision points specifically noted in the guidance and we will do a deeper dive into those decision points to demonstrate how the guidance can be employed. The fourth decision point comes up in Module 4, and we will conduct a similar deep dive into that decision point and the interplay with the guidance in Module 4. A copy of the guidance is included in the Smart Pack, and will be published in the MCM as Appendix 2.1.

Slide 21: 3: Preferral & Referral Process: Non-Binding Disposition Guidance

[SKIP THIS SLIDE FOR THOSE CAs FAMILIAR WITH CONVENING COURTS-MARTIAL AND/OR HAVE DONE SO FREQUENTLY OR PREVIOUSLY]

- A. Decision Point #1: Initiation/Declination of UCMJ Action
- 14 factors to consider at any decision point, which would be in consultation with a judge advocate
 - Range from mission/unit impact, seriousness of offense, evidence admissibility, to consequences of a conviction
 - 5 inappropriate factors that should NOT be considered
 - 4 additional factors if NO UCMJ action is pursued
- B. While none of the factors are conceptually new, they still provide a useful framework and can be helpful for first-time SJAs and CAs. The non-binding disposition guidance included in the Smart Pack should be reviewed prior to giving training to understand what is included.
- C. In determining whether or not to even initiate action under the UCMJ (court-martial or non-judicial punishment), a convening authority should consider, in consultation with a judge advocate, the 14 considerations in all cases (Section 2.1 of the guidance) and the 5 inappropriate factors (Section 2.7 of the guidance). If,

however, a convening authority or judge advocate is weighing to dispose of the case outside of the UCMJ, the guidance provides some helpful considerations in Section 2.6. As previously noted, these four additional factors are not conceptually new and should already be part of the discussion between a convening authority and a staff judge advocate.

- **14 factors to consider in all cases include:**
 1. Mission-related responsibilities of the command
 2. Whether the offenses occurred during wartime, combat, or contingency operations
 3. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command
 4. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense
 5. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition
 6. The extent of the harm caused to any victim of the offense
 7. The availability and willingness of the victim and other witnesses to testify
 8. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial
 9. Input, if any, from law enforcement agencies involved in or having an interest in the specific case
 10. The truth-seeking function of trial by court-martial
 11. The accused's willingness to cooperate in the investigation or prosecution of others
 12. The accused's criminal history or history of misconduct, whether military or civilian, if any
 13. The probable sentence or other consequences to the accused of a conviction
 14. The impact and appropriateness of alternative disposition options—including non-judicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline
- **5 inappropriate considerations include**
 1. Race, religion, gender, sexual orientation
 2. Political association
 3. Personal beliefs of the accused
 4. Personal feelings of the convening authority
 5. Political or professional pressure
- **4 additional factors if DECLINING to take formal action:**
 1. The options available under the alternative means of disposition
 2. The likelihood of an effective outcome

3. The views of the victim, if any, concerning the alternative disposition of the case
4. The effect of alternative disposition on the interests of justice and good order and discipline

Slide 22: 3: Preferral & Referral Process: Non-Binding Disposition Guidance

[SKIP THIS SLIDE FOR THOSE CAs FAMILIAR WITH CONVENING COURTS-MARTIAL AND/OR HAVE DONE SO FREQUENTLY OR PREVIOUSLY]

- A. Decision Point #2: Charging Decisions
 - 14 factors to consider at any decision point, which would be in consultation with a judge advocate
 - Should additionally consider convening 1 court-martial for all known offenses
 - Exception is if multiple offenses would lead to confusion at trial, unnecessarily exaggerate criminal conduct or expose accused to harsher punishment, or alternative disposition is more appropriate
- B. At this point, if charges are being pursued, decision points #2 and #3 go hand-in-hand as deciding forum and what charges and specifications to put on the charge sheet are usually a combined decision.
- C. When deciding to pursue formal charges, the general recommendation is that a single court martial should be convened for all the known offenses. However, if this would cause confusion, unfairly exaggerate criminal conduct/expose accused to harsher punishment, or another disposition is deemed more appropriate, then separate court martials may be convened. These considerations are also covered in Section 2.4 of the guidance.

Slide 23: 3: Preferral & Referral Process: Pre-Referral Subpoena Power

[SKIP THIS SLIDE IF TRAINING IS GIVEN ONLY TO SPECIAL COURT-MARTIAL CONVENING AUTHORITIES]

- A. NEW Article 30a permits:
 - *Pre-referral investigative subpoenas*
 - Pre-referral warrants/orders for electronic communications
 - Pre-referral matters referred by an appellate court
 - Requests to quash/modify a subpoena or other process on grounds that compliance is unreasonable, oppressive or prohibited by law
 - Pre-referral matters under Article 6b(c) or (e)

- B. Now, you have decided to prefer charges. As the GCMCA, you have an additional power granted to you – subpoena power to obtain documents. This new subpoena power has NOT been extended to SPCMCAs. As the GCMCA, trial counsel can now come to you requesting an “investigative subpoena” that you may issue. TCs can then take that document to the agency or individual to obtain documents such as bar receipts, reports, letters, medical records, etc. (ONLY documents and NOT witnesses). A similar power already exists for federal prosecutors in order to help decide perfect charges.**
- C. The purpose of this change is to align the military justice similar to the civilian federal system, where subpoenas may be issued prior to indictment to help the government determine whether there is probable cause for the alleged offense.**
- D. Only a military judge or the appellate courts are authorized to exercise the additional powers listed on the slide.**

Slide 24: 3: Preferral & Referral Process: Pre-Referral Subpoena Power

[SKIP THIS SLIDE IF TRAINING IS GIVEN ONLY TO SPECIAL COURT-MARTIAL CONVENING AUTHORITIES]

- A. Pre-referral Investigative Subpoenas**
- Tool for TC only
 - Documents only
 - Does NOT cover substantive content or electronically stored information
 - Text messages, social media blogs/posts, emails
 - Metadata or subscriber information
- B. A TC may also go to a military judge to seek approval of the investigative subpoena. Should a TC come to you seeking access to electronic information, such as text messages or social media posts/accounts, the TC has to submit the request to a military judge. “Blanket authorizations” or delegating this authority go against the purpose of the Act (to provide GCMCA oversight like the U.S. Attorney in a federal prosecution office) and should be discouraged.**

Slide 25: 3: Preferral & Referral Process: Article 32 Preliminary Hearings

- A. Changes**
- Expands scope and purpose of Article 32 hearing
 - Victim who declines to testify at an Article 32 hearing cannot serve as the grounds to order a deposition of that person

- RCM 405(k) Matters – Submission of supplementary material after the hearing has closed
- B. MJA16 has made two changes to Article 32 hearings, neither of which are as seismic as the changes in 2014. The first change slightly increase the scope of the Article 32 hearing. The revised R.C.M. 405 now allows the Preliminary Hearing Officer (PHO) to hear “what is *relevant* [instead of necessary] to meet the purpose of the hearing [whether there is probable cause for the charges and whether the CA has jurisdiction].” The likely practical effect of this change is that more information will be admitted for consideration than previously allowed under the “necessary standard,” but this remains to be seen.**
- C. The second change is a reaction to the 2014 change and aims to swing the pendulum back in the other direction and give CAs more information prior to the referral decision. R.C.M. 405(k) allows ANY materials to be submitted to the PHO 24 hours after the close of the hearing. Submissions may be made by any party or any named victim, and there are no restrictions on content. Provided the material is made within the 24-hour deadline, the PHO is required to view the submissions, comment upon them in the report, and forward all the materials to the CA for review. Should the government and/or alleged victim submit matters, defense is permitted 5 additional days to review and provide additional information or respond to the submissions.**
- D. The purpose of these changes is to find the appropriate balance between keeping the Article 32 hearings limited in time and scope, while allowing all information to be considered by the CA that was previously removed by the change in the Article 32 process back in 2014.**

Slide 26: 3: Preferral & Referral Process: Pre-Referral Article 34 Advice

- A. General Court-Martial**
- SJA must provide written advice
 - “Probable cause” to move forward + in the “interest of justice and discipline”
- B. Special Court-Martial**
- Must “consult” with judge advocate
- C. Decision Point #3: Selecting Forum/Disposition**
- 14 factors to consider at any decision
 - Forum considerations include SJA advice, min/max punishments, accused’s future service

- Alternative disposition considerations include likelihood of effective outcome, victim's interests
- D. Received PHO report, now SJA reviews and provides written guidance. Process remains the same BUT requirements have changed slight depending on whether a GCM or SPCM is pursued.**
- E. If pursuing a GCM, then the SJA must provide a written memorandum stating that there is probable cause for each charge and specification. In addition, the SJA must provide a recommendation for the disposition in the case, made “in the interests of justice and discipline” (this references the 14 factors from the non-binding disposition guidance discussed above). Without a finding of probable cause and a recommended disposition by the SJA, the case cannot not be referred to a GCM. The Article 34 advice may not be waived.**
- F. If pursuing a SPCM, there is no requirement for a written recommendation from the SJA or judge advocate. However, the CA must “consult” with a judge advocate, which may be a trial counsel, before referring the case.**
- G. In either forum, the CA and judge advocate should continue to consider the 14 factors from the non-binding disposition guidance and an additional 5 forum considerations noted on the slide (Section 2.5 of the guidance). Of note, the advice of the judge advocate, even for SPCMs, may not be waived by the accused.**

Slide 27: 3: Preferral & Referral Process – Effective Dates

- A. Buckets Approach**
1. Offenses
 2. Substantive Provisions
 3. Sentencing Provisions
 4. Convening Authority's Action
 5. *Procedural Provisions*
- B. The changes discussed in Module 3 all fall under 1 bucket: Procedural Provisions. All of the changes (non-binding disposition guidance, investigative subpoenas, new Article 32 processes, and Article 34 advice) discussed in this module are effective 1 January 19 provided that the case is referred on or after 1 January 2019.**

Slide 28: 4: Alternative Disposition

- A. [Module 4 Intro Slide/Photo]
- B. **There are significant changes to alternative case dispositions, in particular plea agreements.**

Slide 29: 4: Alternative Disposition – NJP

- A. NO MORE BREAD AND WATER!!!
- B. **Effective 1 January 2019, bread and water will no longer be a lawful punishment at NJP.**

Slide 30: 4: Alternative Disposition – Guilty Pleas

- A. Decision Point #4: Considering Guilty Plea Agreements
 - 14 factors to consider at any decision point
 - Should additionally consider 13 factors, in consultation with judge advocate, including
 - Seriousness of the offense;
 - Accused's history, service, remorse, cooperation, further service;
 - Victim and witness input;
 - Likelihood of conviction at trial;
 - Probable punishment and collateral consequences from conviction
- B. **The 13 factors to consider in a guilty plea agreement range from the nature and seriousness of the charged misconduct, to the accused's level of remorse to the probable effect of the guilty plea on the victims or witnesses in the case. As with the other factors in the guidance, these 13 factors are not conceptually new and should already be considerations in any given case (Section 3.2 of the guidance).**

Slide 31: 4: Alternative Disposition – Guilty Pleas

- A. Contains only 1 part, and must include all types of allowable punishments
Punishment structure
 - Minimum (“floor”)
 - Maximum (“cap”)
 - Range of punishment (min to max)
 - Members → Same (“unitary”)

- Military Judge → Segmented per specification for confinement and fines only; all others unitary
- B. There will no longer be 2 parts to a plea agreement, and, as such, the new guilty plea model does not include the “beat the deal” concept because the judge and members will see the punishment limitations at the outset prior to sentencing. The sentence limitation portion included in the deal will be binding upon the court-martial (members and military judge).**
- C. The punishment structure has several new nuances. First, punishment can be expressed in a couple of different ways. It can include a minimum punishment (e.g. sentencing authority must adjudicate at least x, y, and z punishments), a maximum punishment (e.g., sentencing authority can issue a punishment no greater than x, y, or z), a punishment range, or potentially be limited to a specific sentence only (e.g., sentencing authority must provide for x punishment only). This last option about a specific punishment is currently pending as a draft Executive Order and may not be finalized until Spring 2019.**
- D. The second nuance is the layout of the sentencing limitation portion of the plea agreement, and will depend on who serves as the sentencing authority. If members, the structure will look largely like it does now as a global or “unitary” sentence for all charges and specifications. If military judge, a global sentence is still provided EXCEPT for confinement and fines. The CA and accused must agree on the term of confinement/fine for each specification, if providing for multiple terms of confinement or fines. Additionally, the plea agreement must state if the terms of confinement run consecutive or concurrently. What this looks like is expressed on the next slide.**

Slide 32: 4: Alternative Disposition – Guilty Pleas



4: Alternative Disposition – Guilty Pleas

	Confinement				Fines	
	Minimum	Maximum	Consecutively with	Concurrently with	Minimum	Maximum
Charge I Art 52 (Order Violation)						
Specification	13 days	30 days		Charge II and III		\$0
Charge II Art 121 (Larceny)						
Specification	36 months	40 months	Charge III		\$1,000	\$2,000
Charge III Art 129 (Burglary)						
Specification	4 months	6 months	Charge II			\$0
Total that may be adjudged (accounting for consecutive or concurrent sentence)	40 months	46 months			\$1,000	\$2,000

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- B. As you can see, you can express the sentence limitation portion in a variety of ways and the complexity of agreement terms has risen significantly. Importantly, the parties can choose and agree to a simple plea agreement that is similar to the current scheme by only defining a minimum or maximum punishment. Other than confinement and fines, all other punishment terms are expressed “globally” and are not segmented by each charge or specification, as you can see on pages 4 and 5 of the new model plea agreement.
- C. What can be bargained for under this new plea agreement structure? For offenses with a dishonorable discharge mandatory minimum, the accused can bargain for a bad conduct discharge BUT ONLY IF the accused provided substantial assistance in the prosecution of another person and the TC recommends issuing a discharge below the mandatory minimum.
- D. What CANNOT be bargained for? The convening authority may not reduce, commute, or suspend a sentence of confinement exceeding six months or a sentence of dismissal, DD, BCD, or a sentence of death even by written agreement in the plea deal. The current provision allowing the plea agreement to include suspension terms for confinement greater than 6 months or for a punitive discharge has been eliminated. The only suspension authority for confinement is if the confinement is 6 months or less OR if the TC or MJ recommends the suspension.

Slide 33: 4: Alternative Disposition – Effective Dates

- A. Buckets Approach
1. Offenses
 2. Substantive Provisions

3. *Sentencing Provisions*
 4. Convening Authority's Action
 5. *Procedural Provisions*
- B. **The changes discussed in Module 4 all fall under 2 buckets: Sentencing Provisions and Procedural Provisions. The change to NJP falls under the Procedural Provisions bucket and is effective 1 January 2019. The new plea agreement structure falls under the Sentencing Provisions bucket.**
- C. **Only one sentencing scheme applies to courts-martial even if the charge sheet and convictions include offenses pre and post 1 January. Accordingly, the CA has 3 options:**
- **Refer offenses to one court-martial and use the pre-MJA16 sentencing scheme,**
 - **Refer offenses to one court-martial and use the MJA16 plea agreement structure BUT ONLY IF the accused “opts in” to these scheme (available only if there is misconduct that straddles 1 January), OR**
 - **Split up the pre and post 1 January offenses and convene 2 separate courts-martial**
- D. **If all of the misconduct to which the accused is pleading guilty occurs pre-1 January, then the current sentencing and plea trial agreement scheme applies even if the proceeding occurs in 2019. If all of the misconduct to which the accused is pleading guilty occurs 1 January 2019 or later, the MJA16 plea agreement scheme applies regardless of the accused's preferences.**

Slide 34: 5: Trial Process

- A. [Module 5 Intro Slide/Photo]
- B. **There are not many changes to actual court-martial process, but the majority of changes largely only concern Trial Counsel, Defense Counsel, and Military Judges.**

Slide 35: 5: Trial Process – Votes for Findings/Sentence

- A. At GCM or SPCM with members, 3/4 concurrence is required for finding of guilty and sentence
- B. Old rule required only 2/3 concurrence
- C. **The change requiring a higher concurrence is not a significant impact. For example, at a SPCM with 4 members, 3 votes would be required under old and new**

rule. At a GCM with 8 members GCM, 6 votes would be required under old and new rule. The change only a GCM that drops to 6 or 7 members, as 1 more person would be needed for conviction/sentence.

- D. NOTE: This slide may be SKIPPED for any type of audience. If so, hide all slides for module 5 (Slides 34-36) and proceed to Slide 37.**

Slide 36: 5: Trial Process – Effective Dates

- A. Buckets Approach
1. Offenses
 2. Substantive Provisions
 3. Sentencing Provisions
 4. Convening Authority's Action
 5. *Procedural Provisions*
- B. **The change discussed in Module 5 fall under 1 bucket: Procedural Provisions. So, for all courts-martial referred after 1 January, the $\frac{3}{4}$ voting rule will apply to findings and sentence. If the case was referred before 1 January, but the trial itself occurred sometime in February or March, the old rule of $\frac{2}{3}$ concurrence will apply to findings and sentence.**

Slide 37: 6: Post-Trial Process

- A. [Module 6 Intro Slide/Photo]
- B. **MJA16 contains significant changes to the post-trial process with the goal of streamlining post-trial review and placing more legal review with the appellate courts in lieu of the SJA and CA's office.**
- C. **NOTE: The next 2 slides briefly cover the last set of amendments to the post-trial process from 2014 as they dramatically changed our practice. If the training audience is familiar with the 2014 changes, SKIP Slides 38 and 39 and proceed to Slide 40.**

Slide 38: 6: Post-Trial Process – 2014 Amendment

- A. Article 60(c)
- Removes discretion to act on findings and to reduce punishment
 - *The authority . . . to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority.*

- B. CA's wide-ranging discretion (pre-2014) was removed, in part, because of the public's and Congress's reaction to a GCMCA Air Force 3-star decision to set aside and overturn a GCM sexual assault conviction against an O5.

Slide 39: 6: Post-Trial Process – 2014 Amendment

A. Findings

- Can modify **ONLY IF** conviction is of a *qualifying offense*
 - Max authorized confinement for any convicted offense is less than 2 yrs;
 - Convicted offense is NOT rape, sexual assault, rape/sexual assault of a child, or sodomy; OR
 - Sentence does NOT include BCD, DD, dismissal, or more than 6 months confinement

B. Sentence

- May **NOT** disapprove, commute, or suspend (in whole or in part) sentence **IF** received
 - More than 6 months confinement; OR
 - BCD, DD, or dismissal,
 - Unless TC recommends or as part of PTA

- C. **Article 60(c)(3)(A) states that CA can only act with respect to findings for a qualifying offense, which is defined by Article 60(d) (as noted above). The restriction on the CA's discretion to act on findings remains the same under MJA16. Similarly, the limited authority to act on punishment/sentence remains the same with MJA16. It does add another exception, if the MJ recommends the CA act upon the sentence, even if outside the scope of authority, then the CA may do so. So, what does that leave for the CA? Clemency.**

Slide 40: 6: Post-Trial Process – Flow Chart



6: Post-Trial Process – Flow Chart

Current Process



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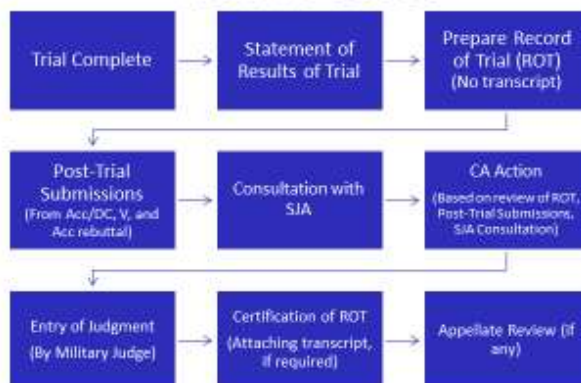
- B. The clogs in the current system occur early on during the transcription process, which holds up the entire post-trial processes and raises concerns about meeting the *Moreno* 120-day clock. Now, post-trial processing will be bifurcated and the transcription will occur separate and apart from CA's Action with the final transcript being re-joined at the final step, which now rests with the MJ and not the CA.
- C. Post-trial submissions, SJA advice, and CA Action will be based on the audio recording and exhibits primarily. Since CA's Action is focused on clemency, the transcript and legal error review are unnecessary. By removing the transcription delay, the proposal streamlines the entire post-trial process.

Slide 41: 6: Post-Trial Process – Flow Chart



6: Post-Trial Process – Flow Chart

New Process



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B. In looking at the new post-trial process, there are several notable changes.

- **“Result of Trial” is now “Statement of Trial Results.” There will be a new fillable PDF form that incorporates the MJA16 changes.**
- **The Record of Trial (ROT) will no longer include a verbatim transcript. The ROT will now be the audio recording, and that is what accompanies the Record throughout the post-trial process until it is rejoined with the transcript after the Entry of Judgment. As noted above, a written transcript is not needed under the current system for CA Action and Entry of Judgment, so post-trial submissions can be completed in a more timely manner.**
- **Post-trial submissions remain the same, but they are based on the audio recording only. The timeline and deadlines for such submissions remain the same, so by Day 35, all submissions will come to the SJA/CA’s office. The accused and victim(s) have 10 days upon receiving the ROT to submit matters and may request up to an additional 20 days. The accused still has 5 days to respond to any matters submitted by the victim(s). For SCM, the 7-day deadline remains for post-trial submissions.**
- **Because legal sufficiency reviews will be removed, a written SJAR detailing legal errors is unnecessary and is the requirement for a written SJAR in its entirety. The CA is required, however, to consult with the SJA prior to taking action.**
- **CA Action remains limited, as discussed above. However, the CA is no longer required to determine the affect of their clemency action on the final punishment awarded to the accused. The CA simply states whether s/he is taking no action, some action, and what that would entail. The military judge compiles all of that information to determine what is the resulting punishment.**
- **The Entry of Judgment is the final milestone in a court-martial (in lieu of CA Action) and also replaces the Promulgating Order. A key take-away is that if there are any deferral periods, the period runs now to Entry of Judgment as opposed to CA Action.**
- **Once issued, the ROT goes back to the court reporter to compile all of the documents to certify the entire Record and then to add the verbatim transcript, if required. All documents are then forwarded for additional post-trial review, if necessary.**

Slide 42: 6: Post-Trial Process – CA Action

A. Retain discretion to defer, reduce, commute, and suspend the following:

- **Confinement of 6 months or less**
- **Forfeitures***

- Fines
- Reduction in Rank*
- Restriction
- Reprimand
- Hard Labor w/o Confinement

B. The CA retains the same discretion on these types of punishments. The asterisks cover automatic punishments, which is covered in greater detail in Slides 44 and 45. If deferring forfeitures or reduction in rank, the CA defers until the Entry of Judgment (NOT to the date of CA's Action).

Slide 43: 6: Post-Trial Process – CA Action

A. Removed discretion for (GCM/SPCM), IF:

- Max authorized punishment for any convicted offense is greater than 2 yrs confinement,
- Total confinement is greater than 6 months,
- Received punitive discharge or death, or
- Convicted of certain sexual assault offenses

THEN, the CA

- May not act on findings, AND
- May not commute, reduce, suspend sentences of confinement greater than 6 months OR punitive discharge/death*

B. The CA still does not have discretion to act on the findings and sentence as changed in 2014. The wording is slightly different, but the effect is the same. The sexual assault offenses are Articles 120(a) (rape), 120(b) (sexual assault), and 120b (rape/sexual assault of a child).

C. There are 2 notable exceptions:

- **When the accused has provided substantial assistance in the investigation or prosecution of another person, the trial counsel can make a recommendation to the CA to commute, reduce, or suspend a sentence (in whole or in part), even if it is below the mandatory minimum or is outside the CA's discretion. The CA's Action must stay within the parameters detailed by the TC's recommendation.**
- **If the military judge recommends suspending a sentence, the CA can only suspend sentences within the MJ's recommendation and cannot suspend any mandatory minimum punishments (Article 60a(c)).**

- D. Remember, the new rules do not affect all courts-martial; ONLY some GCMs and SPCMs (SCMs and the “no BCD SPCM” (except for 112a(b) wrongful use and possession) are not affected).**

Slide 44: 6: Post-Trial Process – CA Action

A. Adjudged Fines & Forfeitures

- Retain full discretion to:
 - Defer, if previously agreed to;
 - Reduce;
 - Suspend; or
 - Commute

B. Automatic Forfeitures

- May only defer until Entry of Judgment
- Triggering events are outside scope of new CA Action authorities
- OR, if plea agreement, could place cap below threshold of triggering events (6 months confinement or less / no discharge) unless below mandatory minimum

- C. What does this all mean practically? For adjudged fines and forfeitures, the CA’s authority remains the same. For automatic forfeitures, the CA can only defer automatic forfeitures until Entry of Judgment. The triggering events for automatic forfeitures, confinement of more than 6 months, death, OR confinement of 6 months or less plus a punitive discharge, are all outside of the convening authority’s power to act. Per the 2014 and MJA16 change, the CA cannot touch the sentence if it includes confinement of greater than 6 months, death, OR a punitive discharge. Accordingly, the only way a CA could protect an accused against automatic forfeitures is in a guilty plea setting and only if the CA places a cap below one of the triggering events. For example, the maximum punishment in the plea agreement would be confinement of 6 months or less and to disallow death or a punitive discharge.**

Slide 45: 6: Post-Trial Process – CA Action

A. Adjudged Reduction in Rank

- Retain full discretion to:
 - Defer, if previously agreed to;
 - Reduce;
 - Suspend; or
 - Commute

B. Automatic Reduction in Rank

- May defer until Entry of Judgment
- May reduce/suspend/commute unless triggering events are outside scope of new CA Action authorities
- OR, if plea agreement, could place cap below threshold of triggering events unless below mandatory minimum

C. **What does this all mean practically? If at sentencing, the accused receives:**

- **A DD/BCD, CA cannot touch the punishment and, accordingly, cannot do anything but defer automatic RIR.**
- **Less than 6 months confinement, CA can reduce/commute/suspend the amount of confinement at CA action and avoid automatic RIR.**
- **More than 6 months confinement, CA cannot touch the sentence and, accordingly, cannot do anything but defer automatic RIR.**
- **Hard labor w/o confinement, CA can commute at CA action and avoid automatic RIR.**

D. **The other way to protect the accused against automatic RIR, similar to automatic forfeitures, is to place a cap on the punishment via a guilty plea agreement that is below the triggering events. The resulting plea agreement would place a cap on confinement of 6 months or less and to disallow a punitive discharge and hard labor without confinement. All of the services will now permit RIR, but the amount of confinement necessary to trigger RIR is still TBD (Sea Services may opt for 6 months as the requirement).**

Slide 46: 6: Post-Trial Process – CA Action

A. Confinement

- ONLY commute, reduce, or suspend if 6 months confinement or less
- UNLESS TC or MJ recommends
- Per plea agreement, can place cap on confinement at threshold of 6 months confinement and then defer, commute, reduce, or suspend

B. **CA action regarding confinement remains the same as it did from the 2014 change.**

Slide 47: 6: Post-Trial Process – CA Action

A. Punitive Discharge

- Protection only per plea agreement to disallow **unless** below mandatory minimum
- Exception if accused provides substantial assistance to TC or MJ recommends

- B. Protection is only possible if provided for in the plea agreement to disallow unless disallowing violates the mandatory minimum punishment. The only exception is if accused provides substantial assistance in another investigation and the TC recommends.

Slide 48: 6: Post-Trial Process – Sentence Execution & Effective Dates

[SKIP THIS SLIDE; INTENDED FOR JUDGE ADVOCATE REVIEW ONLY]

- A. Merges several articles into singular new Article 57 governing the effective dates for all adjudged punishments at court-martial
- Adjudged and Automatic Forfeitures of Pay → Same (By Day 14)
 - Adjudged and Automatic Reduction in Rank → Same (By Day 14)
 - Confinement → Same (Immediately)
 - Punitive Discharge / Dismissal → Same (Appellate Review)
 - Other Lawful Punishments → Entry of Judgment
- B. By merging all of the effective dates for punishments into one article, Congress aimed to make the dates clearer. Because the punishments (other than confinement and discharge) become effective, by operation of law, at Entry of Judgment (as opposed to CA Action), the CA no longer needs to detail when a particular punishment is ordered executed. Discharge would be issued upon completion of appellate review, but would not require action by the CA to order execution of the discharge.

Slide 49: 6: Post-Trial Process – Effective Dates

- A. Buckets Approach
1. Offenses
 2. Substantive Provisions
 3. Sentencing Provisions
 4. *Convening Authority's Action*
 5. *Procedural Provisions*
- B. The changes discussed in Module 6 fall under 2 buckets: Convening Authority's Action and Procedural Provisions. The easiest way to understand the effective date for post-trial processing is to look at the earliest date of the offense that the accused was convicted of and use that version of Article 60 and its corresponding post-trial procedures. This means that offenses that took place in 2013, and the accused was convicted of such offenses, would allow the CA to use the pre-2014 version of Article 60 and could reduce/commute/defer/suspend any punishment without restriction.

C. What does this actually look like in total?

- **Case gets referred 1 December 2018 and goes to trial in January 2019, no changes are in effect for trial procedures (e.g. impanelment) and post-trial procedures (e.g. SJAR still required).**
- **Case gets referred 1 January 2019 for pre-1 Jan conduct and goes to trial in February 2019. At trial, will use new trial procedures (e.g. impanelment) and SOME post-trial procedures (e.g. no transcript with ROT, no SJAR, Entry of Judgment). All things related to CA Action and clemency (deferral, reduce, commute sentences and findings) will use OLD CA CLEMENCY PROCEDURES because all conduct was pre-1 Jan.**
- **Case gets referred 1 February 2019 with mix of pre- and post- 1 Jan conduct and goes to trial in March 2019. At trial, will use new trial procedures (e.g. impanelment). Post-trial, will use new post-trial processing procedures (e.g. faster post-trial submissions with audio recording only, no SJAR, Entry of Judgment). THEN need to look at what accused was found guilty of and when that conduct was committed. If some pre-1 Jan, then same as above and would apply the OLD CA CLEMENCY PROCEDURES. If accused found guilty of only post-1 Jan, then can use MJA16 CA Action and clemency rules.**

Slide 50: Conclusion

A. Questions? [END SLIDE]